Supreme Court, U.S.
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No. 98-1696

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ROY LEE JOHNSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FEDERAL DEFENDER ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a federal prisoner's term of supervised release (18 U.S.C. §3583) commences on the date of his actual release from prison (18 U.S.C. §3624) or on the earlier date on which he properly should have been released where his sentence of imprisonment – which he had already fully served – was vacated retroactively in the wake of *Bailey v. United States*, 516 U.S. 137 (1995).

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FEDERAL DEFENDER ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI*

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 78 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as *amicus curiae* on numerous occasions. *See, e.g., Jones v. United States*, 119 S.Ct. 1215 (1999).

The Federal Defender Association was formed in 1995 to enhance the representation provided under the Criminal Justice Act (18 U.S.C. §3006A) and the Sixth Amendment to the Constitution of the United States. It is a non-profit volunteer organization whose membership includes attorneys and support staff of Federal Defender offices nationwide. One of FDA's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is properly represented.[1]

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[1] Both parties have consented to the appearance of NACDL and FDA as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

STATEMENT OF THE CASE

Respondent Roy Lee Johnson was convicted of two counts of use of a firearm in connection with a narcotics offense (18 U.S.C. §924(c)), in addition to two counts of possession with intent to distribute drugs (21 U.S.C. §841(a)) and one count of firearm possession as a previously-convicted felon (18 U.S.C. §922(g)). In addition to consecutive terms of imprisonment totalling 171 months – subsequently reduced to 111 months on appeal – the district court also imposed a three-year term of supervised release (18 U.S.C. §3583(a)) to commence upon the expiration of respondent's term of imprisonment (18 U.S.C. §3624(a)).

After this Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995), respondent moved to vacate his two Section 924(c) convictions, which was granted by the district court, without opposition by the government. Because respondent had already served two and one-half years beyond the 51 months imprisonment to which he had been sentenced on the remaining counts, the district court ordered his immediate release from prison. Pet. App. 2a, 12a.

Nevertheless, the district court refused to credit the two and one-half years he was erroneously imprisoned to respondent's period of supervised release. Holding that Sections 3624(a) & (e) mandate that a "term of supervised release commences on the day the person is released from imprisonment" and "does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State or local crime" (Pet. App. 15a [quoting §3624(e)]), the district court interpreted the statutory text and the respective purposes of supervised release and imprisonment as fulfilling distinct penological functions, thus warranting separate treatment. Accordingly, the district court refused to credit respondent's two and one-half years of erroneous imprisonment towards his consecutive period of supervised release, ruling that respondent's three year period

of supervised release commenced on the date of his actual release from prison, not the date he should have been released after vacatur of his two erroneous convictions under Section 924(c). Pet. App. 15a-17a.

The court of appeals for the Sixth Circuit reversed. 154 F.3d 569. Pet. App. 4a-5a. The panel held that respondent's term of supervised release began on "the date he was entitled to be released" from prison, "rather than the day he walked out the prison door" (*id.*). Noting that supervised release, while designed to serve rehabilitative purposes, "is also punitive in nature" (*id.*), the panel held that Section 3624(a) "embodies Congress's intent that a prisoner not be held in prison following the expiration of a valid prison term." *Id.* Accordingly, the panel ruled that respondent, whose Section 924(c) convictions were invalid, should not be considered to have been "imprisoned in connection with a conviction for a Federal ... crime", within the meaning of Section 3624(e), during his final two and one-half years of erroneous imprisonment. *Id.* (quoting §3624(e)).

SUMMARY OF ARGUMENT

The Sentencing Reform Act of 1984 requires prisoners convicted of, *inter alia*, certain federal drug offenses to serve a term of supervised release (18 U.S.C. §3583) to commence upon the completion of their term of imprisonment (18 U.S.C. §3624). Supervised release is thus a part of the original sentence imposed upon the judgment of conviction, to run consecutively to any term of imprisonment imposed by the sentencing court.

By the time he had secured vacatur of his two convictions under 18 U.S.C. §924(c) pursuant to *Bailey v. United States*, 516 U.S. 137 (1995), respondent had already served an erroneous two and one-half years' imprisonment beyond the 51 months' incarceration authorized under the

remainder of his sentence. He is entitled to have that two and one-half years of erroneous imprisonment credited against the consecutive three-year period of supervised release originally imposed.

Supervised release is a consecutive specie of punishment. It is an integral part of the original sentence but it does not ordinarily commence until after a prisoner has completed and is released from his term of imprisonment. Accordingly, by delaying a federal prisoner's release from prison, the government may delay the commencement of the prisoner's consecutive supervised release term and ultimate release from penal supervision.

In this case, where respondent was imprisoned erroneously for over two and one-half years, thereby delaying the completion of his ultimate sentence, the government must credit his erroneous two and one-half years of custodial confinement towards his consecutive period of supervised release. The government, in this case, was blameworthy both for respondent's unduly prolonged incarceration as well as for precluding the commencement of the remainder of his sentence.

Accordingly, the government may not delay the ultimate completion of respondent's total sentence – imprisonment as well as supervised release – beyond that contemplated in the amended judgment of conviction and sentence.

ARGUMENT

THE APPLICABLE FEDERAL STATUTES, AS WELL AS PRINCIPLES OF FUNDAMENTAL FAIRNESS AND DUE PROCESS, MANDATE THAT SUPERVISED RELEASE COMMENCES UPON THE EXPIRATION OF A FEDERAL PRISONER'S LAWFUL TERM OF IMPRISONMENT, RATHER THAN THE DATE OF HIS ACTUAL BELATED RELEASE FROM CUSTODY

Under the terms of the Sentencing Reform Act of 1984 (Pub. L. 98-473, Tit. II, ch. II, 98 Stat. 1987), Congress modified the penalty scheme for federal drug offenders by eliminating most forms of parole and replacing them with a new system of supervised release. *Gozlon-Peretz v. United States*, 498 U.S. 395, 400-01 (1991). Under the provisions for supervised release, the sentencing court, rather than the Parole Commission, now oversees an offender's post-imprisonment monitoring. *See* 18 U.S.C. §§3583, 3601. The sentencing court may thus terminate, extend or alter the conditions of the terms of post-imprisonment supervised release prior to its expiration. Supervised release is thus a part of the original sentence imposed upon the judgment of conviction. *See, e.g., United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir. 1995); *United States v. Paskow*, 11 F.3d 873, 881 (9th Cir. 1993); *United States v. Montenegro-Rojo*, 908 F.2d 425, 432 (9th Cir. 1990)(all construing §3583(a) & (e)).

This case thus presents the question of whether the wrongful extension of a federal prisoner's term of incarceration for two and one-half years beyond that legally permissible should go uncredited with respect to a consecutive term of three years' supervised release he is compelled to serve as part of his original sentence. Careful examination of the relevant statutes, as well as principles of

due process and fundamental fairness, mandate that supervised release, as statutorily provided, must be deemed to commence upon the conclusion of a federal prisoner's lawful term of imprisonment, rather than the date of his actual belated release from custody.

A. Vacatur Of Respondent's §924(c) Convictions Was Compelled As A Matter Of Law, Not A Discretionary Application Of The Retroactivity Doctrine

As a preliminary matter, the government's characterization of the vacatur of respondent's §924(c) convictions as analogous to a discretionary retroactive change in the Sentencing Guidelines cannot go unchallenged. Pet. Br. 10-11 n.5 (distinguishing *United States v. Blake*, 88 F.3d 824, 825 (9th Cir. 1996)). Respondent's two firearms convictions were vacated in this case because, under *Bailey*, they were not crimes within the meaning of the statute. *See Bousley v. United States*, 523 U.S. 614, 626 (1998)(Stevens, J., concurring in part and dissenting in part)("Petitioner's conviction and punishment on the §924(c) charge 'are for an act that the law does not make criminal'. There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances that justify collateral relief under [28 U.S.C.] §2255.' *Davis v. United States*, 417 U.S. 333, 346-47 (1974)").

This Court's decision in *Bailey* was thus not a retroactive change in the law. Rather, it was a declaration that the conduct in question was not a crime before as well as after the date of decision. *Bousley*, 523 U.S. at 625-26 (Steven, J., concurring in part and dissenting in part)("This case does not raise any question concerning the possible retroactive application of a new rule of law (citation omitted), because our decision in *Bailey* ... did not change the law. It merely explained what §924(c) had meant ever

since the statute was enacted. *** 'A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction'")(quoting *Rivers v. Railway Express, Inc.*, 511 U.S. 298, 313 (1994)). *See also In re Hanserd*, 123 F.3d 922, 927 (6th Cir. 1997)("the overly broad interpretation of the scope of §924(c) was as wrong before *Bailey* as it is now. *Bailey* did not change the statute's meaning; it clarified what §924(c) has always meant since its enactment").[2]

Accordingly, vacatur of respondent's §924(c) convictions was not a discretionary application of a retroactive change in the law beneficial to the defendant. *Cf. Blake*, 88 F.3d at 825. Rather, it was required as a matter of law because respondent's conduct was not criminal -- and he was not eligible to be punished for it -- under *Bailey*.

B. Supervised Release Is An Integral Part Of The Punishment For The Underlying Offense; As Such, It Is An Integral Part Of The Original Sentence

The lower courts have concluded with virtual uniformity that supervised release is an integral part of the original sentence and that, notwithstanding its rehabilitative concerns, it is also part of the post-incarceration punishment for the offense. *See, e.g., United States v. Soto-Olivas*, 44 F.3d at 790 ("By the plain language of the statute, supervised release, although imposed in addition to the period of incarceration, is 'a part of the sentence' 18 U.S.C. §3583(a).

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[2] *See generally Rivers*, 511 U.S. at 313 n.12 ("[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law, ... Thus, it is not accurate to say that the Court's decision ... 'changed' the law that previously prevailed ... when the case was filed. Rather, ... [the] opinion finally decided what [the statute] has always meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress").

*** Thus, the entire sentence, including the period of supervised release, is the punishment for the original crime ..."); *United States v. Dozier*, 119 F.3d 239, 241-42 (3d Cir. 1997).

Supervised release, like parole, is thus an integral part of the punishment for the underlying offense:

> Under each, a defendant serves a portion of a sentence in prison and a portion under supervision outside prison walls. If a defendant violates the terms of his release, he may be incarcerated once more under the terms of his original sentence. More specifically, a defendant's original sentence determines the length of the term of parole (indirectly) or supervised release (directly). It is also the original sentence that establishes how long the defendant may be required to serve following revocation in the case of both parole and supervised release violations.

United States v. Paskow, 11 F.3d at 881; *see also id.* at 883 (supervised release is "simply part of the whole matrix of punishment which arises out of the defendant's original crimes"); *United States v. Meeks*, 25 F.3d 1117, 1121-22 (2d Cir. 1994)("Because §3583(g) increases the adverse consequences of the violation of conditions that are an integral part of the punishment for the original offense, that section should be viewed as enhancing the sentence for the original crime").

It is thus axiomatic that imprisonment and supervised release both are integral parts of respondent's original sentence which, by operation of law, must be served consecutively. §3624(a) & (e).

Under the circumstances, then, the government has wrongfully imprisoned respondent for two and one-half

years beyond its lawful entitlement, thereby wrongfully delaying the commencement of his consecutive term of supervised release.[3] It should not be permitted to *de facto* lengthen his total period of penal supervision by refusing him credit for his having wrongfully served time under greater supervision than the government was lawfully entitled to impose on him under supervised release. Incarceration, after all, is an even severer punishment than supervised release. *United States v. Montenegro-Rojo*, 908 F.2d at 431 n.8; *United States ex rel. Schuster v. Vincent*, 524 F.2d 153, 161 (2d Cir. 1975)(Kaufman, C.J.)("[S]ince Schuster's prison behavior has satisfied conditions far more strenuous than any the State could or would have imposed in 1969, we must deem Schuster to have completed 5 years of unrevoked parole in 1974").

C. The Government May Not Unlawfully Delay The Completion Of A Federal Prisoner's Sentence

As Justice Scalia has observed in a closely analogous context, "[I]t is no easy task to determine how many days' imprisonment equals how many dollars' fine equals how many months' probation. Comparing the incommensurate is always a tricky business." *United States v. Granderson*, 511 U.S. 39, 59 (1994)(Scalia, J., concurring in the judgment). Notwithstanding the vagaries of statutory construction, whereby the Court may suffer "the double curse of producing neither textually faithful results nor plausibly intended ones" (511 U.S. at 60), there exists an alternative

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[3] Certainly, by analogy to the provisions of the habeas corpus statutes (28 U.S.C. §§2241 *et seq.*), a prisoner serving consecutive sentences is deemed "'in custody' under any one of them" for purposes of the habeas statute. *Garlotte v. Fordice*, 515 U.S. 39, 45-46 (1995); *see also id.* at 46 ("Under *Peyton* [*v. Rowe, 391 U.S. 54, 67 (1968)*], we view consecutive sentences in the aggregate, not as discrete segments. Invalidation of [petitioner's] conviction would advance the date of his eligibility for release from present incarceration. [His] challenge, which will shorten his term of incarceration if he proves unconstitutionality, implicates the core purpose of habeas review").

solution that does no violence to the statutory language or the purposes of §§3583 and 3624.

There exists a common law rule, which has been held applicable to federal sentencing, providing that unless interrupted by fault of the prisoner (e.g., escape), a prison sentence runs continuously from the date on which the prisoner surrenders to begin serving it. The government is not permitted to delay the expiration of the sentence either by postponing commencement of the sentence or by releasing the prisoner for a time and then reimprisoning him. "The government is not permitted to play cat and mouse with the prisoner, delaying indefinitely the expiation of his debt to society and his reintegration into the free community. Punishment on the installment plan is forbidden." *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994). *See also Shields v. Beto*, 370 F.2d 1003, 1006 (5th Cir. 1967); *United States v. Greenhaus*, 89 F.2d 634, 635 (2d Cir. 1937)(L. Hand & A. Hand, JJ.); *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930). *See generally* Gabriel J. Chin, *Getting Out Of Jail Free: Sentence Credit For Periods Of Mistaken Release*, 45 Cath. U. L. Rev. 403, 405-11, 420-33 (1996)(collecting federal authority and discussing the continuing vitality of the doctrine in the aftermath of the Sentencing Guidelines).

As Chief Judge Posner noted (*Dunne*, 14 F.3d at 336-37):

> The common law rule has not been successfully invoked for many years, but we are not disposed to question its continued vitality in the core area of its application, when the government is trying to delay the expiration of the defendant's sentence.[4]

[4] This common law rule applies with particular pertinence to respondent, who was in no respect blameworthy with respect to having been incarcerated two and one-half years *longer* than legally required. As the Second Circuit has observed in precisely this regard:

> [B]oth the statutory examples of "conditions of supervised release" and the Guidelines recommendations for such conditions describe specific types of conduct of the defendant that are constrained. In contrast, we view the timing of the term of supervised release – i.e., its beginning, its end, or its interruption – as substantively different, in part because as to timing the defendant is entirely passive. An order specifying the beginning, running, or ending of the period is not itself an order that the defendant do or refrain from doing something.
>
> *United States v. Balogun*, 146 F.3d 141, 146 (2d Cir. 1998).

The doctrine of sentence credit for time erroneously spent at liberty has been recognized and enforced by federal courts of appeals for nine circuits as well as by the courts of at least fourteen state jurisdictions. *See* Chin, 45 Cath. U. L. Rev. at 406-11 (cases and jurisdictions collected therein). Nor is there anything contained in the Sentencing Reform Act of 1984 or the Sentencing Guidelines suggesting that federal statutes or the Guidelines sought either to keep the doctrine or to abolish it. "In fact, the issue probably was never considered by Congress". *Id.* at 429-30.

Nonetheless, the Sentencing Reform Act and the Guidelines, though efforts at consolidation and reform, are not an exclusive expression of the federal law of sentencing. Many common law sentencing rules, which are not set forth in either the Act or the Guidelines, are still regularly invoked and relied upon. *See, e.g., United States v. Wilson*, 503 U.S. 329, 335-36 (1992)("[c]rediting jail-time against federal sentences long has operated in this manner ... 'It is not lightly to be assumed that Congress intended to depart from a long established policy'")(quoting *Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 627 (1925)); *United States v. O'Neil*, 11 F.3d 292, 298 (1st Cir. 1993): *United States v. Blanco*, 888 F.2d 907, 910 (1st Cir. 1989)("[T]he guidelines represent an approach that begins with, and builds upon, pre-guidelines practice"). *See generally* 2B Norman J. Singer, *Sutherland Statutory Construction* §50.01, at 90 (5th ed. 1992)("Absent an indication that the legislature intends a

statute to supplant the common law, the courts should not give it that effect").

These cases thus point to the proper resolution of the instant case. Here, of course, respondent wasn't improperly released from custody. On the contrary, he was erroneously over-incarcerated for a period of two and one-half years, thereby delaying the commencement of his supervised release, through no fault of his own. Certainly, if a prisoner is entitled to have periods of erroneous liberty credited against the expiration of his prison time, principles of fundamental fairness dictate that excess imprisonment be credited toward a term of far less onerous "supervision". *Schuster v. Vincent*, 524 F.2d at 160 (citing 2 Pomeroy, *Equity Jurisprudence* §363 (5th ed. 1941)(collecting cases)(equity regards as done what ought to have been done and resolves uncertainties against those whose wrongful acts or omission created them); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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